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No. 85-179

In the Supreme Court of the United States

October Term 1985

ROYSTON E. POTTER,

Petitioner,

vs.

MURRAY CITY, a municipal corporation, CALVIN G. GILLEN, individually and in his capacity as Chief of Police of Murray City, MURRAY CITY CIVIL SERVICE COMMISSION, THE HONORABLE SCOTT M. MATHESON, as Governor of the State of Utah, THE HONORABLE DAVID L. WILKINSON, as Attorney General of the State of Utah, STATE OF UTAH and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN RESPONSE TO PETITION OF WRIT OF CERTIORARI FOR THE STATE OF UTAH RESPONDENTS

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STATEMENT OF THE CASE

Petitioner was hired as a police officer by the Murray City Police Department in September of 1980. On

December 1, 1982, Petitioner was terminated by Murray City's Chief of Police, Calvin L. Gillen, for failure to uphold his oath of office, namely, to uphold the Constitution and laws of Utah. (R. Vol. III, 576). Utah Const. Art. III, § 1 prohibits the practice of polygamy and Utah Code Ann. § 76-6-101(1) (1953) makes the practice of polygamy a criminal offense.

Subsequent to his termination and as a result thereof Petitioner sought review of Chief Gillen's decision before the Murray City Civil Service Commission "(the Commission") and filed an application for unemployment benefits from the Industrial Commission of Utah, Department of Employment Security ("Industrial Commission"). The Commission ordered Petitioner's reinstatement subject to renouncing polygamy which Petitioner refused to do. (R. Vol. III, 577). The Industrial Commission denied Petitioner's unemployment benefits.

Consequently, Petitioner brought suit against Respondents in the District Court for the State of Utah for declaratory relief and for damages pursuant to 28 U.S.C. § 1983. The United States was joined as a party upon the motion of the State of Utah. The parties filed cross motions for summary judgment. The District Court denied Petitioner's motion for summary judgment and generally granted Respondents' motions for summary judgment. The United State's motion for summary judgment based upon improper joinder, however, was denied. On appeal, the Tenth Circuit Court of Appeals affirmed and modified the District Court's decision. The Tenth Circuit held that the United States was not a proper party but otherwise affirmed the District Court.

SUMMARY OF ARGUMENT

Certiorari review of this case is not warranted. No court of appeals "has rendered a decision in conflict with the decision of" the Tenth Circuit on the practice of polygamy, nor has the Tenth Circuit or the District Court of Utah "so far departed from the accepted and usual course of judicial proceedings" in this case, "as to call for the exercise of this Court's power of supervision." S.Ct. Rule 17.

Furthermore, this Court has never recognized, and in fact has denied, a constitutionally protected right to practice polygamy based upon the free exercise of religion and has not extended the scope of the fundamental rights strand of the Equal Protection Clause to include the practice of polygamy.

ARGUMENT

There is no need to grant the Writ in the present case. This Court has never held that there is a fundamental right to be married to more than one person at the same time. Without such a fundamental right at stake, the State need only show a rational basis for its regulatory scheme. This is amply reflected in the opinions of the Courts below which discuss the myriad of legal incidents which attach to the civil contract of marriage.

Even if a compelling interest standard should be applied to this issue, it cannot be gainsaid that the elected representatives of the people, in Congress and in all of the 50 states (not to speak of every Western nation), have contemplated "interests of the highest order" when

they have unanimously chosen to base the legal structure of their societies upon a foundation of monogamous marriage. Furthermore, the nature of the civil contract of marriage, with its attendant burdens and benefits, is such that the legislatures are in the best position to define its scope and limitations including specifically the matter of how many spouses a person may have at one time, regardless of any purported religious preferences.

It bears remembering that the Petitioner here has not been molested in any way relative to an arguable right of "privacy," to live with whomever he may choose —that issue may eventually come in another case and on another day. Rather he seeks by this action to invoke the full panoply of legal incidents of the civil contract of marriage for his plurality of wives.[1] This is not "privacy law." The Courts have clearly and repeatedly spoken on this subject and have never departed from the result announced in *Reynolds v. United States,* 98 U.S. (8 Otto) 145 (1878), where this Court clearly determined that the practice of polygamy, even for genuinely held religious reasons, is not protected under the Free Exercise clause of the First Amendment. While the polygamy issue may have been an important national issue at one time, and especially so in Utah, it is hardly worthy of

[1] It is of course specious for Petitioner to say as he does (Petition p.13) that "Utah's laws have accommodated the practice of plural marriage in Utah for over 135 years." If that were literally true, there would be no case at bar for Petitioner would not need to have his marital practices sanctioned by a federal court as a constitutional right in order to achieve the status he seeks. Rather, Utah's laws, like those of all the states, prohibit polygamy and do not extend the legal incidents of marriage to plural wives. Changing this status quo is Petitioner's goal which he now seeks to further by his Petition for Certiorari.

notice today when no legislative body in this country has even contemplated legitimizing the practice.

The Court below has correctly applied the law and the precedents of over 100 years' standing and there is no need for this Court now to re-examine this long-settled issue.

CONCLUSION

Petitioner throughout the course of the present case urges constitutional recognition of an alleged right to practice polygamy. This so-called constitutional right, it is alleged, is protected by the "fundamental rights" strand of the Equal Protection clause of the Fourteenth Amendment and the Free Exercise clause of the First Amendment.

To assert this ostensible right, Petitioner has attempted to create a confusing, conflicting mystique surrounding the penumbral emanations of *Griswold v. Connecticut*, 310 U.S. 479 (1965) and has endeavored to discredit *Reynolds*.

Petitioner's mystique is easily dispersed by a careful reading of the cited cases. Likewise, *Reynolds*, although continually attacked by Petitioner as well as certain scholars, is based upon sound reason; it recognizes the traditional legal underpinnings of our society and its basis upon monogamous marriage. Both the District Court and the Tenth Circuit took comfort in these fundamental historical precedents. For these reasons, a writ of

certiorari should not issue to review the decision of the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 1985, forty copies of the Brief In Response To Petition Of Writ Of Certiorari For The State Of Utah Respondents were mailed, postage prepaid to the Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543 and three copies were mailed, postage to the following:

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I further certify that all parties required to be served have been served.

/s/
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/s/
NOTARY PUBLIC, Residing In
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Subscribed and sworn to before me this 28th day of August, 1985.

My Commission Expires: May 24, 1986